

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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**UNITED STATES**

**v.**

**ALVIN JEROME WALTON**

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**CRIMINAL ACTION  
NO. 04-508-03**

**DuBOIS, J.**

**JULY 20, 2007**

**MEMORANDUM**

**I. INTRODUCTION**

On November 17, 2005, a grand jury sitting in the Eastern District of Pennsylvania charged defendant Alvin Jerome Walton in a Second Superseding Indictment with conspiracy to distribute five kilograms or more of a cocaine in violation of 21 U.S.C. § 846 (Count One); distribution and aiding and abetting the distribution of 500 grams or more of cocaine on or about July 26, 2004 in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B) and 18 U.S.C. § 2 (Count Two); and distribution and aiding and abetting the distribution of 500 grams or more of cocaine on or about July 27, 2004 in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B) and 18 U.S.C. § 2 (Count Three). On April 14, 2006, following a jury trial, Walton was found guilty on all three counts.

Presently before the Court is Walton's Motion for New Trial Pursuant to Federal Rule of Criminal Procedure 33(a). In the Motion for New Trial defendant challenges his conviction under Counts One and Two relating to the mailing of the Express Mail packages on July 26, 2004. In Count One, Walton was charged with two overt acts: the mailing of "approximately 3 kilograms of cocaine in two separate parcels to defendant Anthony Angelo Winfrey via U.S. Postal Express Mail services" on July 26, 2004, and the mailing of "approximately 3 kilograms of cocaine in two separate parcels to

defendant Winfrey via Federal Express services” on July 27, 2004. Count Two charged the substantive crime of distribution relating to the July 26, 2004 shipment of cocaine. The July 27, 2004 shipment via Federal Express, one of the two shipments charged in Count One and the shipment charged in Count Three, is not at issue in the Motion.

Defendant argues in his Motion that (1) the government reviewed but failed to produce a surveillance video tape from a United States Post Office in Houston, Texas (the “Houston Post Office”) from which the Express Mail packages were mailed, in violation of Brady v. Maryland, 373 U.S. 83 (1963); (2) the government failed to preserve a surveillance video tape from the Houston Post Office that might have recorded the mailing of the Express Mail packages on July 26, 2004 by someone other than defendant, in violation of Brady; and (3) the government failed to correct the false testimony of a government agent who testified at trial that, *inter alia*, there were no security cameras in the Houston Post Office. For the reasons set forth below, defendant’s Motion for New Trial is denied.

## **II. BACKGROUND**

### **A. Evidence Presented at Walton’s Jury Trial**

Walton’s jury trial began on April 10, 2006. The jury returned a verdict of guilty on all counts on April 14, 2006. In this Memorandum, the Court sets forth a summary of the evidence presented at trial only as necessary to explain its ruling.

#### **1. Interdiction and Controlled Delivery of the Express Mail Packages**

At trial, the government presented evidence that two Express Mail packages were shipped from the Houston Post Office on July 26, 2004. See Tr. 4/11/06 at 65. On the morning of July 27, 2004, Postal Inspector Yvette Thomas interdicted the Express Mail packages in Philadelphia, Pennsylvania. Id. at 61, 64. Corporal William Burdette, K-9 supervisor for the Eastern Pennsylvania State Police,

testified that his narcotic detection dog sniffed the interdicted packages and signaled, an indication that there was “an odor of narcotics coming from” each of them. Tr. 4/12/06 at 23, 31.

On July 27, 2004, following the use of the narcotic detection dog, Postal Inspector Thomas obtained a federal search warrant for the interdicted Express Mail packages. Id. at 69. Postal Inspector Thomas then “chronologically open[ed] up the packages” and photographed the contents. Id. at 70. Inside the first Express Mail package was “an inner box, a second box, along with the packaging material. And the box [was] wrapped with cellophane.” Id. at 74. The second package was wrapped in the same manner. Id. at 78. Inside the inner boxes were brick-like objects. The first Express Mail package contained one brick-like object; the second Express Mail package contained two brick-like objects. Id. at 75, 78-79. The substance in the brick-like objects field tested positive for cocaine. Id. at 96. Postal Inspector Thomas repackaged the Express Mail packages so that they appeared in their original form for a controlled delivery. Tr. 4/11/06 at 98.

On July 28, 2004 Postal Inspector Joe Casciotta, pretending to be a United States Postal Letter Carrier, delivered the interdicted Express Mail packages to their intended address: 1810 South Broad Street, Apartment 2-B in Philadelphia, Pennsylvania. Id. at 99-100, 203. He testified that he knocked on the door; it was opened, and he stated that he had a parcel for A. Winfrey. Id. at 206-07. The person who opened the door acknowledged that the parcel was for him and signed for the packages. Id. Postal Inspector Casciotta retained the signed mailing labels. Id. at 210.

The contents and packaging of the Express Mail packages were later recovered by government agents. Dwight Glenn Holbrook, a forensic chemist with the United States Postal Inspection Forensics Laboratory testified as an expert witness in forensic chemistry. Tr. 4/12/06 at 11. Holbrook testified that the material in the interdicted Express Mail packages tested positive for cocaine. Id. at 13-16.

## **2. Evidence that Walton Shipped the Express Mail Packages**

At trial, the government presented evidence that it was defendant Walton who shipped the Express Mail packages containing cocaine from the Houston Post Office. That evidence consisted of, *inter alia*, the following.

First, the government presented the testimony of Craig Hellmann, a forensic latent fingerprint analyst with the United States Postal Inspection Service. Tr. 4/12/06 at 56-57. Hellmann testified that he developed two latent fingerprints from the “wadded-up” paper used as packaging material in the interdicted Express Mail packages. Id. at 66-67, 92-93.<sup>1</sup> Those fingerprints matched known prints of defendant Walton. Id. at 82. Hellmann further testified that he developed a latent fingerprint from the cellophane wrap that surrounded the cocaine in the Express Mail packages. Id. at 70-71, 99. That fingerprint also matched the known prints of defendant Walton. Id. at 78, 82, 101.

Second, co-defendant Anthony Angelo Winfrey testified for the government pursuant to a guilty plea agreement. Tr. 4/12/06 at 106, 154. Winfrey testified that in 2004 he moved to an apartment on Broad Street in Philadelphia. Id. at 135-36, 181. According to Winfrey, Walton paid him to receive shipped packages at his Philadelphia apartment, remove an inner package from the box, and pass the inner package on to another person known as “Roty.” Id. at 138-39, 143-44, 150. Winfrey testified that he received packages in this manner on five occasions. Id. at 145, 216. In each case, Winfrey spoke by telephone with Walton around the time of the mailing. Id. at 146.

Winfrey further testified that on June 27, 2004 he “received a phone call from Jerome [Walton] telling me that packages will be coming and for me to be up and ready.” Id. at 161. On June 28, 2004, Winfrey received and signed for a shipment from the Post Office. Id. at 162 (“The Post Office, the

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<sup>1</sup> In his testimony, Hellmann did not distinguish between the two Express Mail packages.

man rings the buzzer, I buzz him in, he comes up, he hands me the package. I signed for it.”). Winfrey then “called Jerome to let him know I received the other package.” Id. at 162. Winfrey also called Roty, who came to the apartment and, after approximately fifteen minutes, left with the packages. Id. at 162-63. Approximately ten minutes later, Winfrey was arrested. Id.

Postal Inspector Thomas testified at trial as to a search of Walton’s home in Katy, Texas on February 23, 2005. Tr. 4/12/06 at 228-29. During the search, the government located a United States Postal Service PS Form 3849, a notice that the Post Office “attempted to deliver on June 23rd of 2003 a certified letter” to a customer, “Alvin J. Walton at 1810 Broad Street, 2B . . .” Id. at 230-31. The government also located an Express Mail Air Bill “that’s addressed, which was never attached and affixed to a package that was sent out . . .” Tr. 6/13/06 at 65. The address on the Express Mail Air Bill was “from Anthony Jones, A. J. Designs, 3601 Augusta, Houston, Texas, 77057, being mailed to Anthony Winfrey, Winfrey Arts Design, Philadelphia, PA, No. 2B, 1810 Broad Street, 19145.” Id. at 66. In addition, the government located a “FedEx Air Bill” dated February 11, 2004, addressed from “Alvin Winfrey, J.W. Designs, 1810 Broad Street, Apartment No. 2B, Philadelphia, PA, 19145, going to Attention: Jay Alton, Postal Connections, 11807, Wesheimer Street, 550 Houston, Texas, 77077.” Id. at 67. With respect to the references to A.J. Designs, Winfrey Arts Design, and J.W. Designs, there was extensive evidence that Walton had a clothing design company and that Winfrey designed products for Walton. See, e.g., Tr. 6/12/06 at 109-116, 121-22, 178; Tr. 6/13/06 at 67. Winfrey testified that Walton sent him fabric swatches and clothing in the mail when Winfrey was living at the Broad Street address. Tr. 6/12/06 at 137.

### **3. Evidence Regarding Surveillance Video Cameras in the Houston Post Office**

At trial, Postal Inspector Thomas testified, incorrectly, on cross-examination that there were no

surveillance video cameras in the Houston Post Office. Her testimony on this issue was as follows:

Trial counsel: Well, you testified, I think yesterday, that you in part know the procedures that FedEx, UPS, other postal agencies use, correct?

Thomas: That's correct.

Trial counsel: Well, you know there's cameras in every post office in the country, aren't there?

Thomas: No – not necessarily. We checked and the particular post office in which the Express Mail packages were mailed from did not have cameras.

Trial counsel: You didn't check one and get the wrong date, you have the wrong date for the time of the delivery or this – or the dropping off of the package in Houston, Texas? You didn't go to check that and you said you had the wrong date in your paperwork? Never had that?

Thomas: I – I don't understand the question.

Trial counsel: Did you check any tapes?

Thomas: There are no tapes.

Trial counsel: My question to you: Did you check any tapes in this case at all? Did you look to see if there were any tapes or did you have agents do that?

Thomas: There's no tapes to check, so no, I didn't check tapes.

. . .

Trial counsel: So you have no evidence that, in fact, the person that Winfrey has attributed to sending these packages, you have no physical evidence, visual evidence, that that person was, in fact, my client, do you?

Thomas: That's correct.

Tr. 4/13/06 at 103-104.

Trial counsel returned to the issue of surveillance video tapes during the cross-examination of Detective Andrew Callaghan. Specifically, trial counsel cross-examined Detective Callaghan on the

basis of a September 14, 2004 report signed by Postal Inspector Thomas, as follows:

Trial counsel: I'd like you to take a look at what's been marked as D-9 for identification. Do you see what that is?

Callaghan: Yes.

. . .

Trial counsel: Page 7, [Assistant United States Attorney] Mr. McSwain.

Trial counsel: "Contact was made with Inspector Scott Ackley from the Houston Division of the U.S. Postal Inspection Service. He was requested to pull the videotape from the 77027 Post Office in order to view the mailer of the Express Mail parcels."

Now, that would be consistent with what you have requested, correct?

Callaghan: Again, that depends on the case.

Trial counsel: Well, in this case it was requested by Inspector –

Callaghan: Okay

Trial counsel: – Thomas, was it not?

Callaghan: Yes.

Trial counsel: Okay. The tape was reviewed, was reviewed, which it appeared to be the wrong date. Now that wouldn't have ended your inquiry, would it?

Callaghan: Again, as I started to answer, and then I'm going to answer generically, every case is different. . . .

Tr. 4/13/06 at 178-79.

The September 14, 2004 report, introduced during the testimony of Detective Callaghan, conflicted with the testimony of Postal Inspector Thomas that there were no surveillance video cameras in the Houston Post Office. Trial counsel argued this point to the jury during his closing argument, as follows:

[Assistant United States Attorney] Mr. McSwain wants to say, well, you know what? The techniques in this case, they're not really important. We don't have to put anybody on tape to try to get a phone conversation. We don't have to do that. All we have is the fingerprints. We don't have to get the videotapes from the UPS and the Postal Service. We don't have to do that.

In fact, Ivette Thomas says, she doesn't do it in this case. She does not do it in this case, yet she's shown her own document, or she's not shown, Detective Callaghan is shown the document dated September 14, 2004, a document produced by Ivette Thomas, Page 7. Made a request of Inspector Scott Acme [sic] in the Houston Division of the U.S. Postal Inspection Service. He was requested to pull the videotape from the Post Office in order to view the mailer of the Express Mail parcels. She denied doing that.

Why isn't she telling the truth? Why is it in her own document, because it doesn't fit? Because it doesn't fit.

Tr. 4/13/06 at 279-80.

**B. Trial Counsel's Motion to Withdraw as Counsel**

On April 14, 2006, the jury returned a verdict of guilty against defendant on all counts. On May 19, 2006, defendant filed a *pro se* document entitled Issues of Ineffectiveness of [Trial] Counsel's Duties, in which defendant asserted that "[t]here is a breakdown in communication between Petitioner and Counsel. Counsel has not communicated with Petitioner since trial April 9, 2006." Defendant further stated that he "is thereby giving notice to this Honorable Court of dissatisfaction of counsel's performance and future ineffective assistance of counsel appealable intentions."

On June 12, 2006, trial counsel filed a Motion to Withdraw as Counsel, in which trial counsel stated: "At this time, there has been a complete breakdown in communication between Petitioner and his client. It is clear that Petitioner and Mr. Walton have irreconcilable differences." By Order dated June 20, 2006, following a hearing, the Court granted the Motion to Withdraw as Counsel. By separate Order dated June 20, 2006, new counsel was appointed to represent defendant. Defense counsel appointed on June 20, 2006 represents defendant in the instant proceedings.



### **C. Defendant's Motion for New Trial**

On November 1, 2006, defendant filed a Motion for New Trial pursuant to Federal Rule of Criminal Procedure 33(a). In the Motion for New Trial, defendant makes three arguments. First, defendant argues that the government unlawfully failed to produce the surveillance video tape reviewed by Postal Inspector Thomas. Second, defendant argues that the government failed to preserve the surveillance video tape that captured activity at the Houston Post Office on July 26, 2004. Third, defendant argues that the government failed to correct Postal Inspector Thomas' false testimony at trial that there were no surveillance video cameras in the Houston Post Office. As a result of the filing of defendant's Motion for New Trial, this Court continued sentencing until further order of the Court.

#### **1. February 1, 2007 Evidentiary Hearing**

On February 1, 2007, this Court held an evidentiary hearing on defendant's Motion for New Trial. At the February 1, 2007 evidentiary hearing, the government presented one witness: Postal Inspector Thomas. Her testimony may be summarized as follows:

Postal Inspector Thomas acknowledged testifying at trial that (1) there were no surveillance cameras in the Houston Post Office and (2) she did not review any surveillance video tapes. Tr. 2/1/07 at 30-32. She admitted those statements were false. Id. at 32. Postal Inspector Thomas explained her testimony by saying that she was overworked and did not review her investigation reports prior to trial. Id. at 39, 49, 51. In particular, Postal Inspector Thomas did not review the September 14, 2004 report, in which she stated that she requested and obtained a surveillance video tape, but discovered it was a tape for the wrong date. Id. at 51.<sup>2</sup> Postal Inspector Thomas testified that she did not intend to mislead

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<sup>2</sup> That report provides, in relevant part, that "[c]ontact was made with Inspector Scott Ackley from the Houston Division of the U.S. Postal Inspection Service. He was requested to pull the video tape from the 77027 post office in order to view the mailer of the Express Mail

the Court. Id. at 36.

Postal Inspector Thomas further testified as to her efforts to obtain the surveillance video tape from the Houston Post Office for the correct date, July 26, 2004. On July 27, 2004, the day of the interdiction, Postal Inspector Thomas telephoned Inspector Scott Ackley to request surveillance video tapes from the Houston Post Office from July 26, 2004. Id. at 16-17. Postal Inspector Thomas received a video tape by Express Mail from Ackley on July 28, 2004. Id. at 17. The video tape that Thomas received had the number twenty-six written on it; Thomas did not write that number on the tape. Id. at 20.

Postal Inspector Thomas did not immediately review the video tape that she received from Postal Inspector Ackley. Id. at 36. When Postal Inspector Thomas ultimately reviewed the tape, some time before September 14, 2004, she determined that it was for the wrong date. Id. at 29. Based upon her review of the video tape, Postal Inspector Thomas believed that the tape depicted events of June 26, 2004 rather than July 26, 2004. Id. at 27. Postal Inspector Thomas did not make further attempts to obtain a surveillance video tape for the correct date. Id. at 29, 35.

## **2. June 13, 2007 Continued Evidentiary Hearing**

On June 13, 2007, the Court held a continued evidentiary hearing on defendant's Motion for New Trial. The government called two witnesses: Gladys Harris, current supervisor of the Houston Post Office and Postal Inspector Ackley. Their testimony may be summarized as follows.

Supervisor Harris testified that she has been Supervisor at the Houston Post Office in Houston, Texas, for approximately one year. Tr. 6/13/07 at 4-5. She is familiar with the current surveillance system, but not with the surveillance system that was in place in July 2004. Id. at 21. Supervisor

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parcels. The tape was reviewed which it appeared to be the wrong date.” Id. at 28.

Harris was shown the video tape received by Postal Inspector Thomas from Postal Inspector Ackley. Id. at 16. When played on a VCR, that tape displayed a date of June 26, 2004. Id. at 18. The tape depicted only one camera angle. Id. at 19.

Postal Inspector Ackley testified that he was contacted in July 2004 with a request for a surveillance video tape from the Houston Post Office, id. at 31-32, but he did not remember sending a video tape to Postal Inspector Thomas, id. at 46. On this issue, Postal Inspector Ackley testified that, in all probability, he did not personally retrieve the tape from the Houston Post Office because, had he done so, he would have sent Postal Inspector Thomas video tapes for the day requested, the day before, and the day after. Id. at 47. Because only one tape was sent, Postal Inspector Ackley believes that he asked the Post Office to either send him the tape for forwarding to Postal Inspector Thomas or that he asked the Post Office to send the tape directly to Postal Inspector Thomas. Id.

Postal Inspector Ackley testified that he knows of no way to determine whether the tape provided to Postal Inspector Thomas depicts events of June 26, 2004, the date displayed on the recording. Id. at 51-52. Rather, Postal Inspector Ackley testified that sometimes VCRs are programmed improperly, which could cause the date and time settings to be incorrect. Id. Postal Inspector Ackley further testified that he has experienced a number of problems in obtaining surveillance video tapes:

I have experienced a bunch of errors, from the tape not being changed for many days and then you pull a day and that particular tape doesn't have the 26th or the 27th on it, it has the 28th or the 29th on it, because they never changed it, or situations such as this where the multiplexer wasn't set up properly and you just have this constant rotation, all sorts of things that you can bump into.

Id. at 45-46.

Defendant filed counseled and *pro se* post-hearing briefs on June 27, 2007 and July 3, 2007.

The government filed a response to defendant's post-hearing briefs on July 5, 2007. Defendant's Motion for New Trial under Federal Rule of Criminal Procedure 33 is now fully briefed.

### III. LEGAL STANDARD

Federal Rule of Criminal Procedure 33 authorizes a district court to grant a new trial "if the interests of justice so require" and in the case of newly discovered evidence. Fed. R. Crim. P. 33.<sup>3</sup> A motion for new trial pursuant to Rule 33 is directed to the sound discretion of the trial court. United States v. Rottschaefer, 178 Fed. App'x 145, 149 (3d Cir. 2006).

A violation of Brady v. Maryland, 373 U.S. 83 (1963), is one ground for a new trial under Rule 33(a). Under Brady, "the prosecution's suppression of evidence favorable to a criminal defendant violates due process when the evidence is material to guilt or punishment." United States v. Risha, 445 F.3d 298, 303 (3d Cir. 2006). To establish a Brady violation, the defendant must demonstrate that "(1) evidence was suppressed; (2) the evidence was favorable to the defense; and (3) the evidence was material to guilt or punishment." Id. "Impeachment evidence . . . as well as exculpatory evidence, falls within the Brady rule." United States v. Bagley, 473 U.S. 667, 676 (1985) (citing Giglio v. United States, 405 U.S. 154, 154 (1972)).

Evidence is material under Brady where there is a reasonable probability that the result would have been different had the evidence been produced. Kyles v. Whitley, 514 U.S. 419, 434 (1995); Bagley, 473 U.S. at 682. Impeachment evidence is material if it might have altered the jury's judgment of the credibility of a crucial prosecution witness. Giglio, 405 U.S. at 154; United States v. Coletta, 59

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<sup>3</sup> Rule 33 provides, in relevant part, as follows: "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment." Fed. R. Crim. P. 33(a).

Fed. App'x 492, 494 (3d Cir. 2003). “The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish ‘materiality’ in the constitutional sense.” United States v. Agurs, 427 U.S. 97, 109-110 (1976).

A defendant may establish a Brady violation “irrespective of the good faith or bad faith of the prosecution.” Brady, 373 U.S. at 87; Risha, 445 F.3d at 303. However, the government’s failure to *preserve* evidence does not amount to a due process violation unless the government acted in bad faith. Arizona v. Youngblood, 488 U.S. 51, 58 (1988); United States v. Ramos, 27 F.3d 65, 69 (3d Cir. 1994). A defendant may establish bad faith by showing that the government knew the exculpatory value of evidence at the time the evidence was lost or destroyed. Yarris v. County of Delaware, 465 F.3d 129, 142 (3d Cir. 2006).

Finally, under the Supreme Court’s “well-established rule,” “a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” Bagley, 473 U.S. at 678 (quoting Agurs, 427 U.S. at 103). This rule applies equally where the government “although not soliciting false evidence, allows it to go uncorrected when it appears.” Giglio, 405 U.S. at 153 (citations omitted).

#### **IV. DISCUSSION**

##### **A. Timeliness of Defendant’s Motion for New Trial**

Under Federal Rule of Criminal Procedure 33(b)(2), a “motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty.” This timeliness requirement is not jurisdictional. Eberhart v. United States, 546 U.S. 12 (2005); In re Ezekoye, 185 Fed. App'x 179, 179-80 (3d Cir. 2006). The 2005 Commentary to Rule

33(a) states: “[U]nder Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion for new trial within the specified time, the court may nonetheless consider that untimely underlying motion if the court determines that the failure to file it on time was the result of excusable neglect.” Fed. R. Crim. P. 33, Advisory Comm. Notes.<sup>4</sup>

In this case, the jury rendered a guilty verdict on April 14, 2006. Defendant filed the instant Motion for New Trial on November 1, 2006. The Court concludes that defendant’s failure to file his Motion for New Trial within the specified time period was the result of excusable neglect under Rule 45(b)(1)(B). This conclusion is based on the irreconcilable differences and the “complete breakdown in communication” between defendant and trial counsel, following the jury verdict. This breakdown resulted in the filing of a Motion to Withdraw as Counsel, which was granted by this Court on June 20, 2006. In addition, the Court finds that the delay in filing the instant Motion for New Trial did not prejudice the government in any way. See Consol. Freightways Corp. of Delaware v. Larson, 827 F.2d 916, 920 (3d Cir. 1987).

#### **B. Defendant’s Brady Claims**

In the Motion for New Trial, defendant argues that (1) the government failed to produce the surveillance video tape received by Postal Inspector Thomas; (2) the government failed to preserve a surveillance video tape from July 26, 2004; and (3) the government failed to correct the false trial testimony of Postal Inspector Thomas. The Court considers each claim in turn.

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<sup>4</sup> Rule 45(b) provides, in relevant part, as follows: “When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party’s motion made . . . after the time expires if the party failed to act because of excusable neglect.” Fed. R. Crim. P. 45(b)(1)(B).

## **1. The Surveillance Video Tape Received by Postal Inspector Thomas**

In his Motion for New Trial, defendant argues that the government unlawfully failed to produce the surveillance video tape received by Postal Inspector Thomas from Postal Inspector Ackley. Had the government produced this tape, defendant asserts, he could have used it to impeach Postal Inspector Thomas, a crucial government witness. The Court rejects this argument, for several reasons.

First, there is absolutely no allegation that the tape received by Postal Inspector Thomas is exculpatory under Brady. The video tape does not depict the mailing of the Express Mail packages by defendant or anyone else. Indeed, there is no allegation that the video tape depicts any events of July 26, 2007, the date of the mailing.

Second, at trial, trial counsel impeached Postal Inspector Thomas as to her testimony regarding surveillance video cameras in the Houston Post Office, and argued at closing that Postal Inspector Thomas was not “telling the truth.” Tr. 4/13/06 at 279-80. The production of the actual video tape would have made little or no difference in this argument, which was based upon the September 14, 2006 report. See, e.g., United States v. Zimmerman, 2001 WL 706256, \* (E.D. Pa. Jun. 21, 2001) (holding that evidence was not material under Brady, in part, because evidence was “cumulative to the impeachment material already in evidence”).

In the face of this record, defendant offers a novel theory as to the impeachment value of the video tape received by Postal Inspector Thomas. Specifically, defendant argues that “Mr. Walton was deprived of the opportunity to challenge the government’s case by revealing to the jury the wide disparity between the tape [received by Postal Inspector Thomas] and the type of surveillance tapes generally produced at the [Houston] Post Office.” Def.’s Suppl. Mem. Law at 13. For example, defendant argues that the tape received by Postal Inspector Thomas “contains information from only a

single camera, rather than from several cameras”<sup>5</sup> and “shows a date of Sunday, June 26, 2004. However, June 26, 2004, was a Saturday.” Id. at 14.

This argument is unavailing, for two reasons. First, defendant’s argument lacks merit. The tape received by Postal Inspector Thomas was not from the date of the mailing of the Express Mail Packages. The fact that that tape allegedly displays, *inter alia*, the wrong number of camera angles or an incorrect date in no way makes the tape “material” under Brady and Giglio. Second, defendant has presented no evidence of the surveillance system used by the Houston Post Office during 2004. Supervisor Harris, while testifying to the surveillance system currently in place in the Houston Post Office, has no personal knowledge of the surveillance system in place in 2004. Accordingly, there is no basis for the Court to conclude that any disparity exists between the tape received by Postal Inspector Thomas, and a properly recorded video tape produced at that time.

Thus, the Court rejects defendant’s Brady claim based on the video tape received by Postal Inspector Thomas.<sup>6</sup>

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<sup>5</sup> Postal Inspector Ackley testified that in his experience it was possible that the video tape did record from more than one camera but that counsel was not playing the video tape on “the correct player.” Tr. 6/13/07 at 46. That issue is not material to the Court’s decision on defendant’s Motion for New Trial.

<sup>6</sup> Defendant makes much of the fact that the tape received by Postal Inspector Thomas displays a date of June 26, 2004. Def.’s Suppl. Mem. Law at 14. Specifically, defendant argues that the Houston Post Office uses video tapes on a rotating cycle, and tapes are reused according to the day of the month. Tr. 6/13/07 at 9-10. Under this system, a tape recorded on June 26, 2004 would have been recorded over on July 26, 2004, and would not have been available to send to Postal Inspector Thomas on July 27, 2004. Id. Defendant argues that this is a reason to doubt the authenticity of the tape received by Postal Inspector Thomas.

The Court rejects this argument, for two reasons. First, the system of recording over tapes on a monthly cycle is the *current* surveillance system in the Houston Post Office. Defendant has presented no evidence of the system in place in 2004. Second, even if the current system were in place in 2004, the discrepancy identified by the defendant is likely the result of a mistake. See Tr. 6/13/07 at 22-23, 45-46 (testimony regarding frequent mistakes in programming



## **2. The Surveillance Video Tape for the Correct Date**

In his Motion for New Trial, defendant argues that the government unlawfully failed to preserve the surveillance video tape of the Houston Post Office on July 26, 2004, the date of the mailing. Defendant argues that this video tape could have exculpated defendant by showing that someone other than defendant mailed the Express Mail packages from Houston to Philadelphia. The Court rejects this argument.

Under Youngblood, the government's failure to *preserve* evidence does not amount to a due process violation unless the government acted in bad faith. Youngblood, 488 U.S. at 58. In this case, defendant argues that the Court may infer bad faith on the part of Postal Inspector Thomas on the basis of her false trial testimony and her failure to timely view the video tape she received from Postal Inspector Ackley. The Court disagrees. At worst, Postal Inspector Thomas was negligent for failing to promptly review the video tape she received and for not requesting that the correct tape be sent. There is no evidence of bad faith. See United States v. Rettinger, 2006 WL 3193701, \*4 (D.N.D. Nov. 1, 2006) (holding that agents may have acted negligently, but did not act in bad faith in failing to preserve casino surveillance recordings).

Moreover, defendant's claim that the surveillance video tape from July 26, 2004 could have been exculpatory is merely speculative. See Ramos, 27 F.3d at 71 (holding that where defendant did not "raise[] a colorable claim" that destroyed evidence contained exculpatory material, no Brady violation occurred); United States v. Stewart, 325 F. Supp. 2d 474, 501 (D. Del. 2004) ("Speculation that evidence contained exculpatory material is insufficient to state a Brady violation."). This is so for

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Post Office VCRs and in switching tapes every twenty-four hours). The fact that the tape received displays a date of June 26, 2004 is not evidence of any untoward activity and does not make the tape Brady material.

three reasons.

First, any number of technical problems could have prevented the security cameras from capturing the mailing of the Express Mail Packages. McCargo v. Costello, 235 F. Supp. 2d 173, 176 (E.D.N.Y. 2002) (“The camera could have malfunctioned or recorded a different area of the [Post Office] while the incident occurred.”). Indeed, defendant argues that the tape received by Postal Inspector Thomas contains a number of “disparities” from a properly recorded surveillance video tape. Def.’s Suppl. Mem. Law at 13-14. The tape for the correct date may have contained similar recording errors.

Second, and more significantly, the government presented overwhelming evidence at trial of defendant’s guilt, including evidence that defendant’s fingerprints were on the Express Mail packaging materials and the cellophane-wrapped cocaine; the testimony of co-defendant Winfrey; and evidence of shipping materials found in defendant’s home. Given this evidence, there is no reasonable probability that had the surveillance video tape been preserved, the results of the proceeding would have been different. Kyles, 514 U.S. at 434.<sup>7</sup>

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<sup>7</sup> By letter from defense counsel dated December 7, 2006, defendant asserted that the labels on the interdicted Express Mail packages were signed by Anthony Winfrey on the signature line for the “mailer.” According to defendant, this evidence supports defendant’s theory that Winfrey mailed the packages from the Houston Post Office. The Court rejects this argument.

At the evidentiary hearing on February 1, 2007, Postal Inspector Thomas testified that the mailing labels on the Express Mail packages did not include any signature on the line for “Mailer’s Signature” at the time they were interdicted. Tr. 2/1/07 at 44-47. After the controlled delivery, the mailing labels contained signatures on that line. Id. This testimony is consistent with the testimony presented at trial that Winfrey signed the mailing labels during the controlled delivery. Tr. 4/11/06 at 207, 210; Tr. 4/12/06 at 162; see also 2/1/07 at 49.

Thus, the Court concludes that Winfrey’s signature is on the mailing labels because he signed for the Express Mail packages in Philadelphia; the mailing labels are not evidence that Winfrey mailed the packages from Houston.

Third, defendant has not shown that the video tape for the correct date, would be exculpatory for an additional reason—the government did not have to establish that it was Walton who mailed the Express Mail Packages in order to obtain a conviction. As to Count One, the drug conspiracy count, the Government was not required to prove any overt acts to establish a violation of 21 U.S.C. § 846. See United States v. Shabani, 513 U.S. 10, 17 (1994); United States v. Gibbs, 190 F.3d 188, 197 n.2 (3d Cir. 1999). As to Count Two, the substantive count charging distribution on July 26, 2004, the government charged both distribution and aiding and abetting. Thus, there would be sufficient evidence to sustain the jury verdict of guilty even if someone else mailed the package, given the evidence of Walton’s involvement in the distribution.<sup>8</sup>

Thus, the Court rejects defendant’s Brady claim based on the failure to preserve the surveillance video tape from July 26, 2007.

### **3. Postal Inspector Thomas’ Testimony**

In his Motion for New Trial, defendant argues that the government illegally failed to correct Postal Inspector Thomas’ false testimony at trial. The Court rejects this argument. As stated above, trial counsel argued at closing that Postal Inspector Thomas was not “telling the truth” when she stated that the Houston Post Office did not have surveillance video cameras and that she did not request video tapes from that Post Office. Tr. 4/13/06 at 279-80. Trial counsel also read into the record, a portion of Postal Inspector Thomas’ September 14, 2006 report, in which she stated that she requested a video

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<sup>8</sup> The government argued this point to the jury during its closing argument, as follows: So that means that in order for him to be convicted on Counts 2 and Counts [sic] 3, he doesn’t actually have to have mailed it himself. He doesn’t have to actually have to have distributed the drugs himself. Maybe he had somebody else do it. Maybe he wrapped up the coke, this is why his fingerprints are all over it, put it into the boxes, and maybe he had somebody else deliver it to wherever it was mailed.  
Tr. 4/13/06 at 259.

tape from Postal Inspector Ackley. Id. at 178-79.

Because the jury heard this testimony and argument, there is no reasonable likelihood that Postal Inspector Thomas' false testimony could have affected the decision of the jury. Bagley, 473 U.S. at 678; Alexander v. Shannon, 163 Fed. App'x 167, 173 (3d Cir. 2006) ("Even if it is assumed that Williams's father testified falsely and that the prosecutor knew of the perjury and acted improperly by not correcting it and by referring to it in closing . . . given the entirety of the evidence against Alexander, he has not shown 'any reasonable likelihood' that the alleged error affected the jury's judgment."). Thus, the Court rejects defendant's due process claim based on the failure of the government to correct Postal Inspector Thomas' testimony.

## **V. CONCLUSION**

For the foregoing reasons, defendant Walton's Motion for New Trial under Federal Rule of Criminal Procedure 33 is denied.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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**UNITED STATES**

**v.**

**ALVIN JEROME WALTON**

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**CRIMINAL ACTION  
NO. 04-508-03**

**ORDER**

**AND NOW**, this 20th day of July, 2007, upon consideration of Defendant Alvin Jerome Walton's Motion for New Trial Pursuant to Fed. R. Crim. P. 33(a) (Document No. 221, filed November 1, 2006); the Government's Response to Defendant's Motion for a New Trial (Document No. 226, filed November 15, 2006); the letter from defense counsel dated December 7, 2006; the letter of Assistant United States Attorney Roberta Benjamin dated December 15, 2006; the letter from defense counsel dated December 20, 2006; the letter of Assistant United States Attorney Roberta Benjamin dated February 16, 2007;<sup>9</sup> [*Pro se*] Post Hearing Brief in Part to Support Defendant's Motion for New Trial Pursuant to Fed. R. Crim. P. 33(b) (Document No. 239, filed March 19, 2007); Supplemental Memorandum of Law in Support of Motion for New Trial Pursuant to Fed. R. Crim. P. 33(a) (Document No. 266, filed June 27, 2007); [*Pro se*] Post Hearing Brief in Part to Support Defendants Motion for New Trial Pursuant to Fed. R. Crim. P. 33(a) (Document No. 269, filed July 3, 2007); the [Government's] Response to Supplemental Memorandum of Law (Document No. 270, filed July 5, 2007); and Defendant's [*Pro se*] Traverse to the Government's Response to Supplemental

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<sup>9</sup> The Deputy Clerk shall docket copies of the letter of defense counsel dated December 7, 2006; the letter of Assistant United States Attorney Roberta Benjamin dated December 15, 2006; the letter from defense counsel dated December 20, 2006; and the letter of Assistant United States Attorney Roberta Benjamin dated February 16, 2007.

Memorandum of Law (Document No. 272, filed July 18, 2007), following an evidentiary hearing on February 1, 2007 and a continued evidentiary hearing June 13, 2007, for the reasons set forth in the attached Memorandum, **IT IS ORDERED** that Defendant Alvin Jerome Walton's Motion for New Trial Pursuant to Fed. R. Crim. P. 33(a) is **DENIED**.

**BY THE COURT:**

/s/ Honorable Jan E. DuBois

**JAN E. DUBOIS, J.**